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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

No. 174.

CARL FRANC ADOLF OTTO INGENOHL, *Petitioner*,
vs.

WALTER E. OLSEN & COMPANY, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PETITIONER.

PRELIMINARY STATEMENT.

This certiorari was granted October 12, 1925, pursuant to sections 7 and 8 of the act of February 13, 1925 (43 Stat. 940), to review a final judgment of the Supreme Court of the Philippine Islands (419-420), which reversed a judgment of the Court of First Instance of said Islands (R. 329-330) and adjudged that

the petitioner (plaintiff below and hereinafter referred to as plaintiff) could not recover from Walter E. Olsen & Company, Inc. (defendant below and hereinafter referred to as defendant), the sum of \$26,244.23, Hongkong currency. The plaintiff sought to recover the said amount as costs, duly taxed and allowed him in another suit, brought by him against the defendant in the Supreme Court of the British Colony of Hongkong (R. 6-9), hereinafter referred to as the Hongkong Court. A motion for a rehearing was denied (R. 432).

STATEMENT OF THE CASE.

The plaintiff is, and has been for many years, a large manufacturer of cigars. He is, and has been for many years, a citizen of Belgium and his residence and principal office has always been in Antwerp. He maintained factories for the manufacture of cigars in Manila and Hongkong, and his cigars, which had long been marketed under trade-marks hereinafter referred to, enjoyed large markets in the Orient. The Manila branch was established in 1882, and until 1905 had been conducted under the corporate name of "El Oriente Fabrica de Tabacos, Sociedad Anonima."

The Sociedad Anonima transferred in 1906 the Philippine tobacco business, including the trade-marks, to plaintiff (R. 190-191) who organized under the Belgian laws an "Association en participation" under the name of the Syndicat Oriente (R. 163-177) to which plaintiff transferred the Philippine tobacco business (R. 150, par. 16). As gerant, or manager of the Syndicat Oriente, plaintiff continued the Philippine business and established in 1908, at Hongkong, China, another factory for the manufacture and sale of cigars. The business was conducted in the Philip-

pine Islands by the Syndicat Oriente under the name and style of "El Oriente Fabrica de Tabacos, C. Ingenohl, Manila," while the business at Hongkong, was conducted under the name and style of "El Oriente Fabrica de Tabacos, Hongkong, Sureusal de la Fabrica en Manila." The difference between the output of the Manila and Hongkong factories was in the use of Java tobacco for wrappers of the Hongkong cigars (R. 150-151).

The cigars were sold under the following trade-marks:

(1) "La Perla del Oriente," (2) "El Cometa del Oriente" and (3) "Imperio del Mundo" (R. 147-151, 185-189). These trade-marks were registered in the Philippine Islands in 1884-1887, as the property of the Sociedad Anonima. They were likewise registered in the British Colony of Hongkong, in 1903. After the aforesaid transfer of the Manila tobacco business to the Syndicat Oriente in April, 1906, an assignment of the trade-marks to "El Oriente Fabrica de Tabacos, C. Ingenohl, Manila," was registered in the Philippine Islands and in 1910 in Hongkong. These trade-marks were registered in France, Australia, New Zealand, and in the Custom House at Shanghai in the name of "El Oriente Fabrica de Tabacos, C. Ingenohl, Manila." The trade-mark "Imperio del Mundo" was registered in Belgium in the name of Carl Ingenohl, Manila, while the others were registered in Belgium in the name of "El Oriente Fabrica de Tabacos, Antwerp, represented by its manager C. Ingenohl." The registration in England was in the name of "Carl Ingenohl, Managing director of and on behalf of El Oriente Fabrica de Tabacos, Sociedad Anonima, Antwerp, Belgium and Manila, Philippine

Islands." (R. 152-153.) Two of the trade-marks were registered in the United States Patent Office in the name of C. Ingenohl. These two trade-marks were El Cometa del Oriente and La Perla del Oriente. The Patent Office refused registration of the third trademark, Imperio del Mundo. (Exhibits "A" and "B," *infra*, pp. 47-52.)

This was the situation in December, 1918.

After the signing of the Armistice and the evacuation by Germany of occupied territory in Belgium, the Deputy Alien Property Custodian in the Philippine Islands who had seized the Manila factory under the Trading with the Enemy Act—with unusual speed—sold and conveyed on January 25, 1919, the property to defendants. The contract of sale, after reciting the seizure of the property in the Philippine Islands, "owing, or belonging to, or held for, by or on account of, or on behalf of the company known as the Syndicat Oriente, a Company formed under the laws of Belgium," conveyed the following property:

"All and singular the property, real and personal, rights, claims, titles, interests, effects and assets of every kind and description whatsoever (except only as specifically reserved and excepted hereinafter), *wheresoever situate in the Philippine Islands*, and all incidents and appurtenances thereto, including the business as going concern and the good will, trade names and trade-marks thereof, of Syndicat Oriente, a company formed under the laws of Belgium with its registered office in Antwerp, Belgium, and heretofore doing business in the Philippine Islands under the name 'El Oriente Fabrica de Tabacos, C. Ingenohl.' " (R. 24.) (Italics ours.)

Then followed in paragraph 1 a description of real estate. Paragraphs 2 and 3 of the agreement included:

"2. The factories and other buildings located upon the above described real estate and all furniture, fixtures, machines, tools, equipment, launches and barges, materials, supplies, labels, brands, tobacco, cigars, raw stock, partly or wholly manufactured, therein *or belonging to said business.*

"3. All accounts receivable or other credits and all contract rights belonging to said business, except *the account owing by the Orient Tobacco Manufactory of Hongkong.*" (R. 38.) (Italics ours.)

The agreement further provided, in paragraph 4, (R. 39) that:

"Neither the United States nor the Alien Property Custodian nor any representative or agent or agency thereof shall be held or admitted to make any representation or guaranty, express or implied, concerning, or in any way respecting the above property or business."

The Alien Property Custodian did not, and could not, seize the plaintiff's property and business in Antwerp, Hongkong, or in any place outside the territorial jurisdiction of the United States.

The plaintiff as Gerant or managing owner of the Syndicat Oriente continued to conduct the Hongkong factory and the sale of cigars therefrom under the trade-marks "La Perla del Oriente," "El Cometa del Oriente," and "Imperio del Mundo," with removal therefrom of any suggestion that the Hongkong business remained connected with the Philippine Islands cigar business.

When the defendants subsequently attempted to sell the products of the Manila factory in the Hongkong markets under the trade-marks, which had been long registered in Hongkong, plaintiff brought a suit in equity against defendant in the Hongkong Court to restrain it from "passing off goods not the plaintiff's manufacture as and for the goods not of the plaintiff." *The defendant appeared, submitted to the jurisdiction and counterclaimed, "asking for an injunction and damages"* (R. 109). The trial of the case consumed ten days and was elaborately argued by counsel on both sides (R. 285-306). The Hongkong Court concluded in an able and exhaustive opinion that plaintiff was entitled to the relief prayed and to costs, judgment being entered accordingly (R. 6-9).

There has never been any contention that the judgment was the result of any fraud or other vitiating feature. *Although the defendant had the right to appeal from the judgment to the Privy Council it did not do so, and thereby acquiesced in the judgment.*

Plaintiff then brought this suit in the Court of First Instance in Manila to enforce payment of the costs (R. 2-4).

An amended answer was filed, denying the validity of the Hongkong judgment, *not because of want of jurisdiction or any fraud*, but solely on the ground that the decision of the Hongkong Court as to plaintiff's right to continue the use of the trade-marks in Hongkong was erroneous. The defendant also filed a counter-claim in the nature of a cross bill, which claimed *damages in the sum of P1,000,000 for plaintiff's misuse of the trade-marks in markets outside of the Philippine Islands* (R. 81-106). Issue was joined upon this claim and counterclaim and thus the ownership of the

trade-marks in question was put in issue, as well as the liability for costs. Plaintiff demurred to the amended answer (R. 130) and the Court of First Instance dismissed the counterclaim and entered judgment for the costs allowed by the Hongkong Court. (R. 258-330.)

Upon appeal to the Supreme Court of the Philippine Islands, the judgment of the Court of First Instance was affirmed as to the counterclaim but on a different ground and reversed as to the costs, two justices dissenting. The decision, in effect, sustained the defendant's title to the trade-marks in any part of the world. The majority and minority opinions are contained in the record, R. 362-394 and R. 395-419, respectively.

QUESTIONS PRESENTED AND PETITIONERS CONTENTIONS.

The plaintiff submits the following as his contentions:

I. The allowance by the Hongkong Court of costs became a fixed liability, and plaintiff in this suit was entitled to enforce it, whether the judgment of the Hongkong Court on the merits of the case was sound or unsound.

II. Section 311 of the Philippine Code of Civil Procedure did not authorize the Philippine Courts to review the judgment of the Hongkong Court, either as to costs or on the merits of the case.

III. If said section is construed as conferring any power on the Philippine Courts to review the judgment of a foreign court in a case of this character, then said section is invalid, as it is inconsistent with the Act of August 29th, 1916 (39 Stat. 554) and the policy of comity in respect to the judgments of foreign courts, and heretofore recognized by the courts of the United States.

IV. Even if the Philippine Court was justified in reviewing the judgment of the Hongkong Court, the plaintiff was, nevertheless, entitled to enforce the Hongkong judgment for the following reasons:

- (a) The Alien Property Custodian did not, and could not, transfer to the defendant any title to the trade-marks in question.
- (b) Even if he had such power, his deed of sale only conveyed to the defendant the right to use said trade-marks in the Philippine Islands.
- (c) The sale of the trade-marks only protected the defendant's product within the territorial jurisdiction of their register, namely, the Philippine Islands. They did not, and could not, confer an exclusive right in the markets of other territorial jurisdiction where the plaintiff's cigars had long been marketed under the same trademarks.
- (d) The enforcement of a trade-mark is for the protection of the consuming public, and in the nature of a police regulation, and each country has a right, within its own territorial jurisdiction, to determine what goods shall be marked under a given trade-mark, and the decision of any foreign court in respect to such use within its jurisdiction should be accepted by the courts of the United States.

ARGUMENT.**JURISDICTION.**

Sections 7 and 8 of the act of February 13, 1925 (43 Stat. 940), authorize this Court to review by certiorari any judgment or decree of the Supreme Court of the Philippine Islands "wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds \$25,000."

The concluding clause of Section 7 is that "except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review." It appears to be the intention of Section 7 to include within the cases, involving statutes of the United States regardless of amount, trade-mark cases arising in the Philippine Islands, which this Court was authorized by section 18 of the act of August 5, 1909 (36 Stat. 177), to review by certiorari regardless of the amount involved.

The majority of the court below concluded that defendant was the owner of the trade-marks and entitled to their use throughout the world as against plaintiff. In effect, defendant's assertion of title to the trade-marks was sustained. While the full value of the trade-marks is not clearly shown in the record, defendant alleged in its counter-claim that their value was \$500,000 in markets outside of the Philippine Islands (R. 254). In view of this admission of defendant, it is a reasonable conclusion that the value of the trade-marks, the title to which is in dispute, is thus far in excess of the statutory amount required to authorize review by certiorari. *Kenaday v. Edwards* (134 U. S. 117).

Even were this not so, the construction of three statutes is involved in the case, two being statutes passed by Congress and the other a statute of the Philippine Islands.

The *first* statute is Section 7 (e) of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended by the act of November 4, 1918 (40 Stat. 1020). We contend that it did not authorize the Alien Property Custodian or his representative, acting for the President, to sell trade-marks without having first seized them by filing an order of seizure in the Patent Office at Washington, D. C., as the "proper office" in which trade-marks used in interstate or foreign commerce of the United States and its possessions or by aliens in such commerce are required by the Trade-Mark Act of February 20, 1905 (33 Stat. 724), to be registered.

The *second* statute involved is the Organic Act for the Philippine Islands and the international comity of the United States. The plaintiff contends that Section 311 of the Philippine Code is in conflict with the Organic Act. The majority of the court below grounded their opinion on paragraph 2 of Section 311 of the Code, enacted by the Philippine Commission under its executive powers to make rules and regulations for the government of the Philippine Islands.

The *third* statute involved is this Section 311. While the other two statutes are sufficient to confer jurisdiction, yet, if necessary, the Court may hold that a statute of the Philippine Islands, enacted indirectly under the authority of Congress, is a "statute" within the meaning of the Act of February 13, 1925.

As this Court granted this certiorari, although its right to do so was challenged in defendant's brief in opposition, we assume that it has already determined this question of its jurisdiction, but if defendant further questions the power of this Court to review this case by certiorari, we will discuss the question of jurisdiction more at length in a reply brief.

POINT I.

THE COURT BELOW ERRED IN HOLDING THE PLAINTIFF WAS NOT ENTITLED TO JUDGMENT FOR THE COSTS AWARDED BY THE HONGKONG COURT IRRESPECTIVE OF THE QUESTION WHETHER THE HONGKONG COURT RIGHTLY OR WRONGLY DECIDED THE MERITS OF THE CASE.

The judgment of the Hongkong Court was that plaintiff was the sole proprietor *with respect to the British Colony of Hongkong* of the trade-marks in question; that the defendant, its servants and agents should be restrained from the use of the trade-marks *in said Colony of Hongkong*; that an account should be taken of the profits made by the defendant in the sale of cigars under the trade-marks; and that the plaintiff should recover his costs of action (which were taxed and allowed at \$26,244.23, Hongkong currency (R. 6-8).

The discretionary power to allow costs in an equity proceeding was stated by this Court in *State of Pennsylvania v. Wheeling and Belmont Bridge Company* (18 How. 460), to be a "power possessed and constantly exercised by every court of equity."

The plaintiff's suit in the Court of First Instance in the Philippine Islands did not seek the enforcement of any part of the judgment of the Hongkong Court, except the payment of the costs (R. 2-4).

We contend that whether the decision of the Hongkong Court as to a matter within its territorial jurisdiction was right or wrong, plaintiff's right to the costs, taxed and allowed, became absolute upon the failure of defendant to appeal from said judgment.

A liability to pay costs is clearly separable from the decision on the merits, and this for the obvious reason that a Court of Equity may impose costs in its discretion. It may impose them on the losing party, or divide them or—when equity prompts—even impose them on the successful litigant. This matter was exclusively for the determination of the Hongkong Court. Even if the Philippine Court could retry the merits of the case, the determination of costs was conclusive and no foreign court could review such action.

The principle that a plaintiff is entitled to payment of the costs, taxed and allowed by a court, regardless of the final outcome of the merits of the subject matter in controversy is strikingly illustrated by *State of Pennsylvania v. Wheeling and Belmont Bridge Company*, *supra*. There the State of Pennsylvania sought and obtained a judgment and decree from this Court, requiring the Bridge Company to remove an obstruction to navigation in the Ohio River caused by the erection of bridges at Wheeling. The Court granted the decree as prayed (13 Howard, 518). Thereafter Congress enacted a law legalizing the bridge, but said bridge was later destroyed and the Bridge Company was preparing to rebuild same when the State of Pennsylvania sought an injunction to prevent its rebuilding. One of the justices of the Court granted a preliminary injunction in vacation. The Bridge Company disregarded same, and the State filed motions for attachment and sequestration of the property. The Bridge Company filed a motion to dissolve the injunction. The Court dissolved the injunction and denied the motions of the State but held that the "portion of the decree which directs the costs to be paid by the defendants [the Bridge Company] must be granted" (18 How.

421.) Subsequently a motion was made for leave to file a bill of review so far as respected the orders and decrees for costs, but this motion was also denied in an opinion dated May 12, 1856, (18 How. 460-463). In other words, the judgment of the Court on the merits of the controversy with respect to the bridge had wholly failed by reason of the subsequent act of Congress. Yet the judgment for costs was unaffected.

An unsuccessful party litigant should not be allowed to dispute the validity of a judgment for costs when same has become final through his failure to appeal or otherwise. The case, thus decided and acquiesced in, became the law between the parties and the liability of the losing party, who has had his day in Court, to pay the costs imposed upon the losing party becomes a fixed liability, independent of the right, *if any*, of the losing party to contest the merits of the controversy in another proceeding.

The fact that the costs in this case were taxed and allowed in the judgment of a foreign court does not change the principle.

In *Russell v. Smyth* (9 M. & W. 810), an action was brought against a defendant resident in England to recover costs, which had been imposed upon him in a suit in Scotland for a divorce. (The Scotland Courts are considered in England as foreign courts.) It appeared there, as is here stipulated (R. 144), that the Scotland Court had jurisdiction over the subject matter and that defendant had appeared and contested the action. The English Court allowed judgment for the costs, Baron Parke stating that "where the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay it, which may be enforced in this country." See also *Woodward v. Hale*, (30 Fed.

Case No. 18005); *Davis v. Cohn*, (85 Mo. A. 530); *Pearson's Estate*, (6 Pa. Co. 298); *Giles & Halbert*, (12 N. Y. 32); *Brady v. New York*, (3 N. Y. Super, 569).

Also the fact that the Hongkong judgment was based in part on the construction of an American contract of sale, does not change the rule. *Godard v. Grey* (L. R. 6 Q. B. 139, 5 E. R. C. 726). The imposition of costs is an inherent right of a judicial tribunal and essential to its efficacy.

If the costs are an integral part of the judgment—as was assumed by the Court below—the question whether same may be impeached under paragraph 2 of Section 311 of the Code (assuming, *arguendo*, its validity), is considered *infra*, pp. 25-29.

An award of costs is to be treated as a debt: *Ex party Thayer* (11 R. I. 160).

If the Court should hold, in accordance with *State of Pennsylvania v. Bridge Company, supra*, that the award of costs made by the Hongkong Court is separable from the judgment on the merits, Section 311 of the Code, regardless of other reasons hereinafter advanced as to its inapplicability, does not apply and the judgment below should be reversed.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE TRADE-MARKS IN DISPUTE WERE EITHER SEIZED OR SOLD BY THE ALIEN PROPERTY CUSTODIAN TO DEFENDANT.

The certificate, under seal, of the Commissioner of Patents, hereto attached as Exhibit "A," (pp. 47-51), shows that neither the President nor the Alien Property Custodian or representatives of either filed a "requirement," or order of seizure in the United States Patent Office of the trade-marks La Perla del Oriente or El Cometa del Oriente, which were registered in the Patent Office. Exhibit "B," (pp. 52-53), shows that the third trade-mark in dispute, Imperio del Mundo, was never registered in the United States Patent Office.

These facts were not introduced in evidence in the courts below and the omission to do so is regretted by present counsel. However, the omission is not serious, for it is well established that this Court will take judicial notice of the public records of the Departments of the United States Government. *Ex parte Hitz*, (111 U. S. 766); *Coffee v. Groover*, (123 U. S. 1); *Jones v. United States* (137 U. S. 202); *Paquette Habana* (175 U. S. 677); *New York Indians v. United States* (170 U. S. 1); *Underhill v. Hernandez* (168 U. S. 250). The original certificates, (Exhibits "A" and "B"), have been filed by counsel with the clerk of this Court instead of awaiting a suggestion of the Court that such be done, as in *Ex parte Hitz, supra*.

The whole case is before the Court on *certiorari* and it may, and, we respectfully submit, should correct the effect of the judgment below as to the ownership

of the trade-marks, as well as correct the judgment below as to the costs.

The effect of the failure of the Alien Property Custodian, or his representative, to file a "requirement," or order of seizure of the trade-marks La Perla del Oriente and El Cometa del Oriente in the United States Patent Office is that said Alien Property Custodian did not, and could not sell and convey same to defendant in the deed, or contract of sale dated January 25, 1919. They remain the property of plaintiff. As the trademark Imperio del Mundo was not registered in the Patent Office, same could not have been seized by the Alien Property Custodian and it also remains the property of plaintiff. The fact that the physical property of plaintiff, or of the Syndicat Oriente, of which he was gerant in the Philippine Islands, was seized and sold to defendant did not *ipso facto* transfer to defendant the plaintiff's trade-marks.

The Trading with the Enemy Act of October 6, 1917, (40 Stat. 411), provided, in section 7 (e), that:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, * * * shall be conveyed, transferred, assigned, delivered, or paid over to the Alien property custodian."

This section did not authorize the Alien Property Custodian to seize the title to trade-marks. See *Ammon v. Narragansetts Dairy Company* (C. C. A. 262 Fed. 880), to the effect that unless a statute, authorizing the forfeiture and sale of a business, specifically authorizes the seizure and sale of trade-marks, the sale of the

property does not include the trade-mark used on the product of the business.

Not only does Section 7 (c) not specifically include trade-marks, but other sections of the same statute contain an indisputable intendment that such marks should not be seized. Section 10 (a) provided that any enemy or ally of an enemy "may file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label," etc. Section 10 (e) authorized the *license*—not seizure—by the President of any trade-mark or patent owned by an enemy or ally of an enemy and provided for a fee therefor to be held, in part, for the owner, and Section 10 (f) provided that the *owner* of any trade-mark may, after the end of the war and until the expiration of one year thereafter, "file a bill in equity against the licensee [of the President] in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business * * * for recovery from the said licensee for all use and enjoyment of the said * * * trade-mark," whereupon the court was authorized to "adjudge and decree to the said owner payment of a reasonable royalty."

The unambiguous terms of the Trading with the Enemy Act of October 6, 1917, indubitably establish:
(1) That neither the President nor the Alien Property Custodian was authorized to seize enemy owned trade-marks; (2) That the seizure of "money or other property" as provided in section 7 (c) of said act did not include the seizure of the trade-marks used in marketing the products of any seized business; and (3) That for purposes of the Trading with the Enemy Act of October 6, 1917, the seizure and sale of an enemy

owned business did not carry with it, as an incident nor as an appurtenance, the trade-marks used on the products of said business, as alleged by the defendant in the courts below. (R. 246-247). In other words, for the purpose of the Trading with the Enemy Act trade-marks were placed on the same footing as patents and the intendment of said act is clear that transactions thereunder were not to be governed by the principle that the sale of a business carried with it the transfer of the trade-marks used thereon.

The reason for the rule is clear. Enemy owned factories, etc., in the United States or its possessions were branch establishments,—as the Philippine tobacco business of plaintiff was a branch of his Antwerp business,—and the seizure and sale of a part of a business was not the seizure and sale of the whole thereof. It is instructive to note that the war legislation of other countries, as shown by the references collected in the margin,¹ did not authorize the seizure of enemy owned trade-marks registered in such countries but only the suspension or avoiding of such registrations and the license of them for use during the war.

Such was the law until November 4, 1918, when by statute of that date, (40 Stat. 1020), section 7 (c) of the original Trading with the Enemy Act of October 6, 1917, *supra*, was amended to read as follows:

"If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights,

¹ England, 415, Geo. 5, Chap. 27, Act August 7, 1914, Chap. 73, Act August 28, 1914; Austria, Ministerial Decree of October 31, 1917, Article 3, paragraph 3; Ministerial Decree of August 16, 1916, Article 1; Germany, Proclamation of Imperial Chancellor of October 10, 1915, Article 10, paragraph 3, Decree of July 1, 1915, Article 1. See also Section VIII of the Treaty of Versailles and St. Germain respecting trademarks during the late World War.

applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded." (Italics ours.)

This amendment did not make it mandatory that there be seized enemy owned trade-marks. It merely authorized their seizure and specifically provided the procedure as to the manner and method of effecting such seizures. It did not modify the theory of the original Trading with the Enemy Act that an enemy owned business could be seized and sold without seizing and selling the trade-marks used in marketing its products.

It will be noted that the amendment of November

4, 1918, provides that the "requirement," or order of seizure of trade-marks shall be filed in the "proper office" for the registration and recording of assignments of trade-marks and that if so filed, such an order of seizure shall have the same force and effect as a duly executed assignment of the trade-marks.

The question arises as to what was the "proper office" for the registering or recording of assignments of trade-marks and said question is answered by the Trade-Mark Act of February 20, 1905 (33 Stat. 724). Section 1 of said act provided for the registration in the United States Patent Office of trade-marks used by citizens or aliens in interstate or foreign commerce. Section 10 of the Trading with the Enemy Act specifically excepted from its terms the registration in the Patent Office by alien enemies of trade-marks, patents, and copyrights. Section 10 of the Trade-Mark Act required every assignment of trade-marks to be recorded in the United States Patent Office.

As one of the trade-marks in dispute, Imperio del Mundo, was never registered in the United States Patent Office and as no "requirement" or order of seizure was ever filed therein as to the other two trademarks registered therein by plaintiff, *it necessarily follows that the disputed trade-marks were never seized in this case and that the Alien Property Custodian or his representative did not, and could not convey same to the defendant in the agreement of January 25, 1919.* Also, since the Trading with the Enemy Act of October 6, 1917, contemplated the seizure of enemy property and its sale without the trade-marks, if any were used on the products thereof, *the sale of the business did not convey the trade-marks used on the products of the business as an appurtenance thereto.*

It may be argued that the laws of the Philippine Legislature authorized the registering of trade-marks and assignments thereof in the Public Library in Manila, (Sections 1699, 1703, and 1704, Philippine Administrative Code, 1917.) The answer is that the record does not disclose that a "requirement," or order of seizure of the trade-marks was filed in said public library, but even if it had been so filed, such a filing and seizure does not conform to the express requirement of Section 7 (c) as amended, of the Trading with the Enemy Act. As stated, the Trade-Mark Act of 1905, provided that all registrations and assignments of trade-marks used in interstate and foreign commerce should be in the United States Patent Office. Furthermore, some of the states of the American Union, as shown by the references collected in the margin,² authorized state registrations of some trademarks.

² Arizona, Section 357, Revised Statutes, 1913; Arkansas, Section 7960, Act April 20, 1895; California, Section 3197, Political Code, Amendment of March 21, 1911; Colorado, Section 3, Act April 10, 1899; Connecticut, Section 4899, General Statutes, 1902; Delaware, Section 3, Chapter 699, Vol. 19, Laws of Delaware; Florida, Section 4996, Code; Georgia, Section 1990, Code 1895; Idaho, Section 2316, Compiled Statutes, 1919; Illinois, par. 8, Sec. 3, Vol. 3, Starr & C. Statutes, 1896; Indiana, Section 8681, Burns Annotated Indiana Statutes, 1901; Iowa, Section 5049, Trade-Mark Laws; Kansas, Section 9670, Chapter 119, General Statutes, 1909, Sections 11654 and 11656, General Statutes, 1915; Kentucky, Sections 1409-7, 4656, 4749, Kentucky Statutes; Louisiana, Section 3, Act No. 49 of 1898; Maine, Section 22, Chap. 40, Revised Statutes, 1903; Maryland, Section 3, Act April 4, 1892; Massachusetts, Section 7, Chapter 72, Revised Laws; Michigan, Section 5, Article 15458, C. L. 1915; Minnesota, Section 8860, G. S. 1913; Missouri, Section 13263, Revised Statutes 1919; Montana, Section 2037, Political Code; Nebraska, Sections 3553, Compiled Statutes, 1901; Nevada, Section 1, Act of 1907; New Hampshire, Section 3 of an Act for Protection of Trade-Marks; New Jersey, Section 3, Chap. 50, Laws 1898; New Mexico, Section 1, Chap. 24, Laws 1905; New York, Chaps. 9, 25, Laws of 1909; North Carolina, Section 3973, Chap. 77, Consolidated Statutes; North Dakota, Section 2601, Revised Code, 1905; Ohio, Section 6240-1, 102 O. L. 513; Oklahoma, Section 11004, Chap. 89, O. R. L. 1921; Oregon, Section 5, Chap. 97, Laws 1911; Pennsylvania, Section 3, Act, April 24, 1905, No. 210; Rhode Island, Section 3, Chap. 196, General Laws, 1909; South Caro-

The statutes of many of the states authorized registration of trade-marks used by labor unions or on the products of union labor while some of the other states provided for more general registration. Some of the states did not provide for the registration of any trade-marks. State statutes as to the registration of trade-marks were extremely diverse and it is not reasonable to assume that Congress intended the term "proper office" in the Trading with the Enemy Act, as amended, to include the various offices of some of the states for the registration of trade-marks. Whenever Congress has intended to impose on other persons than Federal officers duties with respect to the administration of a Federal law, specific provision to that effect has been included in said Federal law. See, for example, the Fugitive Slave Act of September 18, 1850, (9 Stat. 462); Pink Bollworm Act of July 24, 1919, (41 Stat. 270), providing for "cooperation with the State of Texas or other States concerned," and, page 252, for building roads in cooperation "with States;" section 6 of the Selective Service Act of May 18, 1917, (40 Stat. 80, 81).

It is not reasonable to conclude that the term "proper office" in section 7(c) of the Trading with the Enemy Act, as amended, for the registration or recording of assignments of trade-marks includes, or was intended to include the various offices of the states and possessions of the United States authorized by local

lina, Section 2, Act February 24, 1910; South Dakota, Section 10414, Chap. 348 Code, 1919; Tennessee, Section 4, Act January 31, 1905; Texas, Section 4, Chap. 81, General Laws, 1895; Utah, Section 2721, Title 83, Compiled Laws, 1907; Vermont, Section 5961, General Laws; Virginia, Section 2, Act April 30, 1903; Washington, Section 11539, Remington Code; West Virginia, Section 19, Acts 1901; Wisconsin, Section 13201, Ch. 127, Laws, 1909; Wyoming, Section 3439, Compiled Statutes, 1910. The remainder of the States had no laws for the registration of trade-marks of any kind whatever.

law to register and record trade-marks and to exclude seizures in such of the states as had no, or limited trade-mark registrations.

There is a further answer to any contention that the filing of a "requirement", or order of seizure under the Trading with the Enemy Act, as amended, could be in a Philippine Islands' office for the registration or recording of trade-marks. The Trade-Mark Act of 1905, extended to the Philippine Islands for section 17 of said Act, conferred jurisdiction on District Courts of the United States to hear and determine disputes arising out of the Trade-Mark Laws and Section 26 of the Philippine Tariff Act of August 5, 1909 (36 Stat. 180), conferred upon the courts of the Philippine Islands jurisdiction identical with the jurisdiction conferred upon courts of the United States by said Section 17 of the Trade-Mark Act of 1905.

The reasonable conclusion is that the Trade-Mark Act of 1905, extended to the Philippine Islands; that any local registration in the Islands of trade-marks was comparable to the diverse registration in some of the American states; that the filing of an order of seizure of trade-marks with such local offices of registration (if such were done in this case) was not a compliance with Section 7 (c), as amended, of the Trading with the Enemy Act; and that since the Alien Property Custodian or his representative, did not lawfully seize the trade-marks in dispute, he could not convey same to defendant.

III.

THE COURT BELOW ERRED IN HOLDING THAT THE FINAL JUDGMENT OF THE HONG-KONG COURT WAS NOT CONCLUSIVE BOTH AS TO THE MERITS OF THE CONTROVERSY AND THE INCIDENTAL QUESTION OF COSTS.

The majority opinion of the court below concluded that there was a clear mistake of law and fact in the judgment of the Hongkong Court and that Section 311 of the Code prevented it from giving effect to the judgment or even to the award of costs of the Hongkong Court, even though it was admitted in the pleadings and stipulation that the said Hongkong Court had jurisdiction of both the cause of action and the parties; that the parties appeared and were heard; and that there was no suggestion of fraud or other irregularity in the judgment. The minority opinion concluded that there was no clear mistake of law and fact in the Hongkong judgment; that Section 311 of the Code did not apply; and suggested that if the said section did apply, it was void as in conflict with the Organic Act and American international law and comity.

The majority opinion referred to Section 311 only, of the Code but it is necessary to consider the preceding Section 310 and the pleadings in the Court of First Instance, particularly the amended answer. Sections 310 and 311 of the Code (House Document No. 2, Vol. 11, 57th Congress, 1st Session, p. 478) are as follows:

"Sec. 310. Effect of judicial record of a Court of Admiralty for a foreign country.—The effect of a judicial record of a Court of Admiralty of a foreign country is the same as if it were the rec-

ord of a Court of admiralty within the Philippine Islands.

Sec. 311. *Effect of other foreign judgments.*—The effect of a judgment of any other tribunal of a foreign country, having jurisdiction to pronounce the judgment, is as follows:

1. *In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;*

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title; but the judgment may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.” (Italics ours.)

Section 310 demonstrates that judgments in admiralty, which are ordinarily *in rem*, are not included in the foreign judgments as to the “title” to a “specific thing” made conclusive by paragraph 1, Section 311. In view of the use of the word “right” in paragraph 2 of said section with respect to judgments against persons, the question arises as to the meaning of “thing” as contrasted with the word “right” in the same section. A key to this meaning lies in the fact that one member of the Philippine Commission, which drafted Section 311, was a lawyer from California, a state once governed by the Civil, or Roman law, and having in Section 1915 of her Code of Civil Procedure a provision almost identical with said section 311. We are thus justified in searching the Civil law for the meaning of “thing” as used in the section with respect to the conclusiveness of foreign judgments.

The word “thing” (*res*) has, in Civil law, a sense as artificial and as wide as “person.” As “person” in said law comprehends every being who has rights and

is subject to them, so "thing" comprehends all that can be considered as the object of a right. The object of a right may be incorporeal, or the pure creation of the law and need not be limited to things corporeal and visible. The law can separate a right to possess an object and the right to use it and the object of each right is called indifferently a "thing." The aspects in which we may view "things" are too various to admit of a simple classification but a frequent classification is into corporeal and incorporeal. Sandar's *Institute of Justinian*, 1st American Edition, 1876, pp. 33-34; Justinian's Institute, Lib. II, Title II, 1, 2, 3; Sherman, *Roman Law in the Modern World*, 2d Edition, Vol. II, pp. 139-147; Bouvier, Law Dictionary, 15th Ed., p. 727.

The "specific thing" mentioned in paragraph 1, Section 311 as contrasted with "right" in paragraph 2 of said section is not limited to things corporeal. A trade-mark is either a corporeal or incorporeal "specific thing," particularly as treated by the Trading with the Enemy Act of October 6, 1917, and its amendment of November 4, 1918. The Treasury Department considers a trade-mark a thing for the purpose of taxation and an investment in advertising a trade-mark is taxed as a capital investment independent of, and often in excess of the actual fiscal assets of many concerns. Treasury Department, Bureau of Internal Revenue Cumulative Bulletin No. 2, 1920, p. 292; Holmes, *Federal Taxes*, 6th ed., pp. 621, *et seq.* It would seem to be clear that a judgment concerning a dispute arising out of the Trading with the Enemy Act, as amended, as to trade-marks is a judgment against a "specific thing"—the object of rights, the trade-marks—and is conclusive on the court below under the specific terms of Section 311 of the Code.

The distinction, which Section 311 sought to make, was between suits involving personal obligations (as ordinary tort actions, damages for breach of contract, divorce proceedings, etc.), and suits which involve the "title" to property. As to the first class, the judgment was *presumptively* correct, and as to the second, *conclusively* correct. In this case the claim and counter-claim in the Hongkong Court created an issue as to the title to the trade-marks.

The fact that the judgment of the Hongkong Court was against a specific thing was recognized by the defendant when it set up in its amended answer title to the trade-marks (R. 250) and attempted to reopen and retry the title thereto (R. 247).

Furthermore, the Trade-Mark Act of 1905 recognized trade-marks as "specific things" by its provision for their registration and for the recording of their assignments. The Trading with the Enemy Act both before and after the amendment of November 4, 1918, continued and emphasized such recognition. We recognize that American and English decisions as to the nature of trade-marks, *where the matter is not controlled by statute*, are in conflict as to whether they are property or merely an incident to property or whether their improper use should be prevented out of regard to the owner or of the consuming public, as shown by the references collected in the margin.³

³ This court said in *Hanover Milling Company v. Metcalf* (240 U. S. 403), that the primary function of a trade-mark is to identify the origin or ownership of the articles to which it is affixed and that the courts afforded redress upon the ground that a party has a valuable interest in the trade-marks adopted to maintain his business. It said in *Coca Cola Company v. Koke Company*, (254 U. S. 143), that "it would hardly be too much to say that the drink characterises the name as much as the name the drink." It was said in the *Trade-Mark Cases* (100 U.S. 82) that a trade-mark is a property right and that the whole system of "trade-

We submit that whatever may be the correct conception, on general principles, of the nature of trademarks and the basis of the protection that courts extend to them, the amended Trading with the Enemy Act placed them in the same class with tangible property of an alien enemy and specifically provided the method and manner of their sequestration. We also submit that the judgment of the Hongkong Court was against specific things—the trade-marks—and was conclusive on the court below, under the express terms of paragraph 1, Section 311 of the Code. The issue in the Hongkong case was the property right in a "thing" to wit, certain trademarks and the plaintiff was adjudged to be the owner of the "title." Hence the case falls clearly within Section 1 of paragraph 311, as a case in which the judgment of a foreign court is "*conclusive*" (R. 66-67).

mark property" existed anterior to a Federal Trade-Mark Act. It was said in *International News Service v. Associated Press*, (248 U. S. 215), that a court of equity "treats any civil right of a pecuniary nature as a property right" and Lord Justice Sargent said in *Harrods Limited v. R. Harrods Limited*, (41 Rep. Pat. Cas. 74), that under the word 'property' may well be included the trade reputation of the plaintiff." Chaffee said in 34 Harvard Law Review, 388, 407-8, that "Equity has long safeguarded such state-recognized mental property as patents, copyrights and trade-marks."

IV.

EVEN IF THE COURT BELOW RIGHTLY INTERPRETED SECTION 311, IT ERRED IN HOLDING THAT THE JUDGMENT OF THE HONGKONG COURT WAS A "CLEAR MISTAKE OF LAW OR FACT."

Assuming, *arguendo*, that the Alien Property Custodian had seized and sold to defendant the three trademarks in dispute and that they did not constitute specific "things" within the meaning of paragraph 1, Section 311 of the Code, it does not follow that the judgment of the Hongkong Court as to the title to the trademarks in the Hongkong markets and under the Hongkong registration was a "clear mistake of law and fact." It would seem, as pointed out in the minority opinion (R. 417), that the fact that "a trial Judge of long experience and two members of this [Philippine Supreme] Court," concurred with the Hongkong Court in itself justifies the conclusion that there was no "clear mistake" of either law or fact in the Hongkong judgment.

The Trading with the Enemy Act was a harsh statute and it was harshly exercised in this case to seize and sell the business of a citizen of an *allied* country—a business he had spent more than fifty years in developing. Such a statute contains many elements of a forfeiture statute and should have a strict construction. *But however construed, it could not and did not confer extraterritorial power on the Alien Property Custodian to seize either the home office in Antwerp or the other branch business in Hongkong or the foreign registrations of the trade-marks of plaintiff.*

While arising under a different statute, the *Chart-*

reuse cases—*Baglin v. Cusenier Company* (221 U. S. 580); *Rey v. Leconturier* (1910 A. C. 362),—would seem to be conclusive on this point. In these cases, as well as in the instant case, there were certain assets which neither the French liquidator nor the Alien Property Custodian could seize and sell, as, for example, the reputation acquired by the products *in foreign countries and represented by trade-marks registered in said countries.*

As has been shown in Point II of this brief (*ante*, pp. 16-24), the Alien Property Custodian did not seize in accordance with Section 7 (c) of the Trading with the Enemy Act as amended by the act of November 4, 1918, the trade-marks registered in accordance with the Trade-mark Act of 1905, and he certainly could not seize the trade-marks registered in foreign countries, including Belgium and the British Colony of Hongkong (R. 70-71).

A trade-mark is in the nature of a police regulation and is primarily and principally intended to prevent any fraud upon the public. It is for each nation to determine within its own territorial jurisdiction what force should be given to a trade-mark to prevent such fraud. The Hongkong Court, recognizing that the products of the Hongkong factory had been sold for many years by the petitioner under these trade-marks, refused to permit the public of the British Colony of Hongkong to buy defendant's cigars in the belief that they were plaintiff's.

The conclusion of the court below that defendant owned the trade-marks and was entitled to their use in foreign markets, because of the seizure of the physical property of a branch office in Manila, cannot be justified by the decisions of this or any court.

In fact, the contract, or deed of sale did not purport to convey any rights to plaintiff's business outside of the Philippine Islands, the language being "wheresoever situate in the Philippine Islands" of a company "heretofore doing business in the Philippine Islands" (R. 24) and "except the account owing by the Orient Tobacco Manufactory of Hongkong" (R. 38). As stated in the minority opinion (R. 415) :

"The intent of the parties to the conveyance is made clear by the language of the instrument. The limited operation of the conveyance is clearly expressed by its language. The phraseology of the deed was used advisedly, since the Alien Property Custodian had no desire to do what it would be futile to attempt—*to convey property outside the Philippine Islands and the United States.* There is in the instrument an entire absence of reference to trade-marks in foreign countries." (Italics ours.)

The defendant, in its amended answer, alleged that it became the owner of the trade-marks as an incident or as an appurtenance to the going business (R. 246-247). The majority of the Court below sustained this contention (R. 377). We think it clear, however, that this is error. We concede that ordinarily, *where a business is located in one place*, its sale as a going concern generally includes any good will and trade-marks used on the products of the business in such locality. But a different question is presented when a business has branches in many countries and only one branch is or can be seized.

When Germany, during the war, seized branches of business concerns, whose principal office was in other

countries, did its sale thereof give exclusive use of trade-marks in all foreign nations? If so, how could American world-wide concerns, like the Standard Oil Companies, continue in business, if their German branch was seized and trade-marks used all over the world thereby ceased to be the property of the American concern?

The sale in this case was not a voluntary sale of the Philippine branch business, comparable with the voluntary sale of the American branch business of the French firm, considered in *Bourjois & Company v. Katzel* (260 U. S. 689). *The sale was entirely involuntary as to plaintiff.* His Philippine property was seized under the sovereign power of the United States, but inadvertently or otherwise the Alien Property Custodian failed to seize the Trade-marks by filing a requisition, or order of seizure in the United States Patent Office, as he did in *Hunyadi Janos Corporation v. Stoeger* (5 Fed. 2d, 506), and in the *Chemical Foundation case*, which has been argued and submitted to this Court but not decided at the time this brief is being written. It follows that he acquired no right to the trade-marks and that he could not and did not convey same to defendant and *in any event the sale of the trade-marks had no force in other nations.*

The Trading with the Enemy Act did not originally provide for the seizure of trade-marks. *It was not until after the amendment of November 4, 1918, that enemy owned trade-marks could be seized and such seizure was not mandatory.* Seizure of the Manila physical plant was not a seizure of the trade-marks, for section 7 (c) of the Trading with the Enemy Act, as amended, required the seizure of the trade-marks to be effected by filing the notice of seizure in the Patent Office.

The necessary result of these provisions is that for the purpose of the Trading with the Enemy Act, a going concern could be seized and sold, with or without the trade-marks used on its products, and that seizure of the physical plant of a branch business did not constitute seizure of the trade-marks of the entire business, containing the main offices and other branches in foreign countries.

The home office of the Philippine business was in Antwerp, Belgium. *The Alien Property Custodian could not seize said office or whatever foreign registrations of trade-marks were appurtenant to that office.* Even if he seized and sold the title to the trade-marks, in so far as Philippine and American rights were concerned, such a sale did not operate to divest plaintiff's title to, and use of the trade-marks in Hongkong, Belgium and other foreign countries.

The right to a trade-mark may exist in one person or company in one country and in a different person or company in another country and the owner in one country can not invade the markets of the other person in another country where his trade-marks are registered: *Bourjois & Company v. Katzel, supra.*

Particularly is this true with respect to the product of a business seized under the Trading with the Enemy Act. The alien enemy's business in the United States was generally a branch of his home business. The purpose of the law was to seize these branch factories, etc., and to conserve them for return to their rightful owners or to sell them to persons not enemies, permitting the marketing of the product until November 4, 1918, under licenses of such of the trade-marks as had been registered in the Patent Office and thereafter under

ownership of such of the trade-marks as it was deemed expedient to seize and sell.⁴

As a matter of fact, the judgment of the Hongkong Court is in consonance with the judgments of American Courts arising out of the Trading with the Enemy Act.

In *Koppel Industrial Car & Equipment Company v. Orenstein & Koppel Aktiengesellschaft, et al.*, (289 Fed. 446, 452, C. C. A. 2d Circuit), the Alien Property Custodian had seized the *American branch* of an alien owned business, apparently including its American trade-mark rights, and had sold same to the plaintiff. After the war the main office in Germany attempted to regain its *American* customers by pretending to represent itself as continuing the business sold. The Circuit Court of Appeals, citing the decision of this Court in the *Bourjois case*, reversed the District Court in refusing to grant an injunction and held that it constituted unfair competition for the German company to use said trade-marks in the *American markets*. But the right of the German company to use said trade-marks in other countries—particularly Germany—

⁴If, as has been stated, a "trade-mark has value because it means something, because it indicates to the purchaser that certain goods have a certain commercial origin, and if the fact of their having this origin makes them desirable and more readily accepted by the public than goods having a different origin," the procedure of permitting the palming off on the public of goods purporting to be manufactured by the people who developed the business and even the good will, when in reality such people had nothing to do with the manufacture of the goods, constitutes a fraud on the public. Cigar making is an art. The consuming public in foreign countries have a right to be protected against the sale to them of cigars manufactured by the defendant under trade-marks which they had learned through more than thirty-five years to associate with plaintiff's cigars and clearly the judgments of the local courts of such foreign countries as to the protection of their people against the palming off of products as the products of an established concern, with which the people are familiar, should be considered as conclusive on the courts of other countries.

was unchallenged. A temporary injunction was granted and later made permanent.

In the case of *Hunyadi Janos Corporation v. Stoeger, supra*, the purchaser of the *American* branch of the business and the *American* rights to the trade-marks which had been seized under the Trading with the Enemy Act, secured an injunction against the invasion of the *American* markets of said *American* branch by the former owner thereof and the owner of the main business in Hungary.

The case at bar is an even stronger case than the *Bourjois, Koppel and Hunyadi cases*, for the reason that it is an attempt of the purchaser of a branch factory to use the trade-marks, etc., in competition with the main business, or another branch thereof, in the foreign territory of the former owner. In other words, if the owner of the main business cannot invade the markets of his former branch business, using common trade-marks, it follows, *a fortiori*, that a branch business can not invade the markets of the main business or branches thereof in foreign countries of the former owner using common trade-marks.

To recapitulate, the Alien Property Custodian neither seized nor purported to sell and could not sell the right of plaintiff to use his trade-marks in the Hongkong markets; the right of such use is governed by the law of Hongkong as interpreted and applied in the judgment of the Hongkong Court; the judgment of the Hongkong Court was not erroneous and the failure of the Philippine Court to give it full credit was a violation of the comity of nations, to which great policy our nation is peculiarly committed.

V.

THE COURT BELOW ERRED IN NOT HOLDING THAT PARAGRAPH 2, SECTION 311 OF THE CODE, AS CONSTRUED BY IT, WAS VOID BECAUSE IN CONFLICT WITH THE ORGANIC ACT AND THE INTERNATIONAL COMITY OF THE UNITED STATES.

Through deference to the oft-repeated desire of the Court to avoid holding a statute nugatory when otherwise possible to determine the conflicting private rights of litigants, we have postponed to this point our contention that paragraph 2, Section 311 of the Code, as construed by the court below, is in excess of the powers conferred on the Philippine Commission; that the Congress has never ratified said paragraph; that it is in conflict with the Organic Act; and that it is contrary to the international law and comity of the United States.

This Court exhaustively considered the matter of impeachment of foreign judgments in *Hilton v. Guyot*, (159 U. S. 95), and in *Ritchie v. McMullen*, *id.* 230, and said in the latter case with respect to an attempt to impeach a Canadian judgment:

"By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect. *Scott v. Pilkington*, 2 Best & S 11; *Abouloff v. Oppenheimer*, L. R. 10 Q. B. Div. 295, 307; *Vadala v. Lawes*, L. R. 25 Q. B. Div. 310, 316; *Nouvion v. Freeman*, L. R. 15 App. Cas. 1, 10; *Fowler v. Vail*, 27 U. C. C. P. 417, 4 Ont. App. Rep. 267.

The defences set up in the answer to this Canadian judgment reduce themselves to an attempt,

without any sufficient allegation of want of jurisdiction of the cause or of the defendant, or of fraud in procuring that judgment, or of any other special ground for not allowing the judgment full effect, but upon general allegations setting up the same matters of defense which were pleaded and might have been tried in the foreign court, to reopen and try anew the whole merits of the original claim in an action upon the judgment. This for the reasons stated in *Hilton v. Guyot*, *ante*, 95, cannot be allowed.

Upon principle, therefore, as well as upon authority, comity requires that the judgment sued on should be held conclusive of the matter adjudged."

The principle was pointedly expressed by Lord Ellenborough in *Tarleton v. Tarleton* (4 M. & S. 20), as follows:

"I thought I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings abroad."

Cockburn, C. J., said in *Dent v. Smith* (L. R. 4 Q. B. 414), wherein it was alleged that the foreign Court erred:

"We do not sit here as a Court of Appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of Russian law. The proper tribunal to appeal to, if there was any ground of appeal, was to the Court of St. Petersburg."

See also *Milne v. Van Buskirk* (9 Iowa, 558); *Mes-sina v. Petrococchino* (L. R. 4 P. C. 144); *Pemberton v. Hughes* (1 Ch. 781), *Henderson v. Henderson* (3 Hare, 100); Piggott on Foreign Judgments, 337-419.

The following statement of Lord Campbell in *Bank of Australasia v. Nias* (20 L. J.: Q. B. 284) where an

attempt was made to impeach a judgment of a Colonial Court is especially pertinent because of the attempt of the court below to impeach such a Colonial judgment. He said:

"We are bound to take judicial notice that by the law and constitution of this empire, there is an appeal [from this judgment of the Colonial Court] to Her Majesty, who would refer the appeal to the judicial committee of Her Privy Council. * * * A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued."

In fact, the court below conceded that it would have been required to give effect to the Hongkong judgment, had it not been for section 311 of the Code, which it construed to authorize impeachment of the judgment. (R. 378-383.) Assuming, *arguendo*, that the Section, rightly interpreted, gave the lower Court such power, is such Section valid under the Organic Law of the Philippine Islands?

Soon after the acquisition of the Philippine Islands and before their pacification—military governments being abhorrent to our traditions of liberty—the late President McKinley sent a Board of Commissioners, headed by the present Chief Justice of this Court, to the said Islands, under a letter of instructions dated April 7, 1900, to establish a measure of civil government for the inhabitants of the Philippine Islands. (See House Document No. 2, Vol. II, 57th Congress, 1st Session, pp. 5-10, for a printed copy of the letter of instructions.) There is nothing in President McKinley's letter of instructions which suggested that he deemed it necessary, in order to extend civil govern-

ment to the inhabitants of the Philippine Islands, to give the courts thereof power to disregard foreign judgments because of allegations of mistake of law or fact therein.

Indeed it would be surprising to find in said instructions any suggestion that the courts of the Philippine Islands should have greater power in this respect than had either the Federal courts or state courts. Such power would subject not only judgments of the Philippine Courts but the judgments of this Court to the retaliatory action of the courts of foreign countries, whose judgments were disregarded by the Philippine Courts.

In view of the close commercial and other relations of the British Empire and the United States, this would indeed be serious, should the courts of the British Empire subject the decisions of American courts to retaliatory action (R. 418-419).

The Board of Commissioners promulgated, among other things, Act No. 190, to take effect on September 1, 1901, and designated as a Code of Civil Procedure for the Philippine Islands. In the meantime, Congress had provided in the Spooner Amendment of March 2, 1901 (31 Stat. 910), that: "All military, civil and judicial powers *necessary* to govern the Philippine Islands," until otherwise provided should "be vested in such persons and * * * exercised in such manner as the President of the United States shall direct" (Italics ours).

It was not *necessary* for the President, or such persons as he should appoint to govern the Philippine Islands, that the courts thereof should possess and exercise the power of impeaching a foreign judgment solely because of an alleged mistake of law or fact—a jurisdiction and power, it is repeated, at no time

possessed and exercised by the courts of the United States, as is shown by *Hilton v. Guyot*, and *Ritchie v. McMullen, supra*. Such judicial jurisdiction and power had not been found "necessary" to govern the people of the United States during more than a century, our jurisprudence having proceeded on the assumption that it was conducive to the interests of both the nation and individuals that there should be an end of controversy and that American courts should not sit in appellate review over the judgments of foreign courts, unless impeached for lack of jurisdiction or fraud.

The act of July 1, 1902 (32 Stat. 691), confirmed the creation of the Board of Commissioners for the Philippine Islands and its duties as stated in President McKinley's letter of April 7, 1900. It also ratified the act of said Commission in creating by a regulation, or act of September 6, 1901, departments of the interior, commerce, police, finance, justice, and public instruction.

It did not ratify the Code of Civil Procedure, which had also been promulgated by said Commission.

The maxim, *expressio unis est exclusio alterius*, may be given effect here, particularly when approval of paragraph 2, section 311 of the Code would mean departure from the elementary rule of American courts not to allow impeachment of foreign judgments of an inferior court on a mere allegation of mistake of law or fact therein, a mistake which could have been corrected by the appellate courts of that foreign country.

Neither the act of July 1, 1902 (32 Stat. 691), nor the Organic Act of August 29, 1916, went further than to provide, generally, that the courts of the Philippine Islands should possess and exercise jurisdiction as

theretofore provided. There is nothing in either of said acts nor in any other act applicable to the Philippine Islands, which could be construed as an express ratification of paragraph 2, section 311 of the Code, similar to the express ratification contained in the act of July 1, 1902, of the Philippine Commission Act of September 6, 1901.

We submit that paragraph 2, section 311 of the Code was void *ab initio*, because in excess of the powers conferred on the President and by him transmitted to the Commission and afterwards confirmed by the Congress and that it never become valid *ex post facto* by any reenactment or express approval of the Congress (R. 67-68).

As stated in the dissenting opinion (R. 418-419), this disregard of a foreign judgment of integral parts of the British Empire, in such close proximity as are the ports of Manila and Hongkong, because of an alleged mistake of law and fact is of serious importance. Our courts have heretofore made no distinction between the judgments of the courts of England and the judgments of the other courts of the British Empire, and if this international comity should be overthrown by the courts of the Philippine Islands, it may be that the English courts, in retaliation, will make no distinction between the judgments of the courts of the United States and its possessions.

We think recent events in the Philippine Islands and the seeming trend of their local government demonstrate that it would be unwise for its courts to possess jurisdiction and power, not possessed by courts of the United States, to reopen and retry the merits of issues determined by a final foreign judgment of the English courts, whose learning and integrity have long been the model and inspiration of the civilized world.

CONCLUSION.

We cannot conclude this brief without some reference to the undisputed and extraordinary facts of this case, which should, and we confidently believe will, dispose this Court to resolve doubts, if there be any, in favor of the plaintiff, who unquestionably has been in this matter the victim of an act of gross and inexcusable injustice.

The plaintiff was not a German or in any sense an enemy of the United States during the Great War. He was and had been for many years a citizen of Belgium and, as such, was a citizen of a nation, which was an ally of the United States.

The purpose of the Trading with the Enemy Act was to seize the property of the *enemies* of this country and, even as to them, the purpose of the seizure was merely to sequester such property during the war and as a war measure. The property seized was to be held by the United States in trust, *even for our enemies*, and to be returned to them upon the termination of hostilities.

Upon what theory, then, could the property of a citizen of a *friendly* nation be seized? The only justification, legal or moral, was when the friendly alien was temporarily subject, by the fortunes of war, to the domination of the German military authorities through military occupation. Under these circumstances, property, belonging to Belgian and French citizens, who were unhappily residents of occupied territory, could be seized. It is needless to add that, in respect to such unfortunate victims, the purpose of the United States was not a hostile one, but purely friendly, and, in respect to such, the trust relation of the United States was one of peculiar sanctity.

The United States peculiarly owed it to a friendly nation and to one of its citizens to hold the property intact, until such time as it could be safely restored to its rightful owner, especially as it was not property of a perishable character.

In this case the amazing fact is disclosed by the record that, *after the Armistice and after the evacuation of Belgium by the German Army*, and, therefore, without any possible justification, the United States, through the misguided zeal, to express it charitably, of some of its representatives in the Philippine Islands, sold this property. Fortunately for plaintiff, they had overreached themselves with respect to the trade-marks by failing to observe the terms of the very statute, under which they acted.

"Worse remains behind."

The harshness of this action in selling the property at a forced sale after the Armistice is intensified by the fact that Ingenohl was in Belgium, many thousands of miles away, and could not protect his interests. The record fails to disclose that any notice whatever was given to him of the intended sale. He awoke one morning in Antwerp to find that a factory, to which he had given nearly fifty years of industrious work, had been sold by the representatives of the United States, a country with which his country was not at war. The common experience justifies the conclusion that a sale, thus hastily had, could have resulted only in a great sacrifice of the true value of the property.

The whole proceeding in respect to this citizen of a friendly nation was *in invitum*.

It is now contended by defendant that this unwarrantable sacrifice of the physical property of a friendly alien, not only carried with it his exclusion to sell under his trade-marks in the Philippine Islands,

but also his inability to utilize the trade-marks, whose value he had developed many years before the war, in pre-existing markets outside the territorial jurisdiction of the United States, and to accomplish this end, which certainly has no justification in morals, a majority of the Supreme Court of the Philippine Islands has disregarded a decision of a court of a friendly nation, which in respect to its territorial jurisdiction has ruled that these trade-marks, long since registered in Hongkong, may be rightfully used in that territorial jurisdiction by the man, whose industry and skill made those trade-marks valuable.

The whole proceeding savors of the ancient spoliation of "Naboth's Vineyard."

Indeed, the question concerns rights that are even broader than those of the plaintiff. One of the main purposes of trade-mark law is the protection of the public. It had its origin and its justification in the belief that it is the duty of the state to protect its citizens from imposition. As such it is essentially a police regulation and within the police powers of the government of the territorial jurisdiction.

Here a case is presented of a manufacturer, whose skill and industry for half a century have given a peculiar reputation to his products. In Hongkong and throughout the Far East, the public have for many years bought Ingenohl's cigars under certain trade-marks because of its confidence in the quality of such cigars. Whether Belgium, Hongkong, or any other foreign nation, shall protect its citizens from buying cigars under certain trade-marks, which they believe to be the Ingenohl cigar but which, in fact, are manufactured by new manufacturers (who may conceivably have little of Ingenohl's skill and commercial integrity) is a question of fair dealing and police regulation,

which each nation should decide for itself. The Hongkong Court has held that in its territorial jurisdiction the interests of consumers require that they should not be imposed upon by a cigar, which they have long bought under a given trade-mark as the product of Ingenohl, when, in fact, it is no longer manufactured by Ingenohl.

For all these reasons, we respectfully submit that this Court can and should do an act of tardy justice by holding:

1—That the Alien Property Custodian did not and could not sell these trade-marks.

2—That even if he had any such power, the sale was restricted to the use of the trade-marks in the territorial jurisdiction of the United States and its possessions, and

3—In any event, it should hold that, as the defendant had his day in court in the Hongkong tribunal, its decision, acquiesced in by the defendant through its failure to appeal, became the law between the parties as to the right to use the trade-marks outside of the Philippine Islands.

4—Even if this Court is unable to sustain any of these three contentions, it should hold that, without respect to the question of the true ownership of the trade-marks, the plaintiff was entitled to recover his costs which had been adjudged him by a court of competent jurisdiction and the right to which is wholly independent of the question whether the decision of the Hongkong Court, as to the ownership of the trade-marks, was sound or unsound.

Respectfully submitted,

JAMES M. BECK,
O. R. McGuire,
Counsel for Petitioner.

EXHIBIT "A."

DEPARTMENT OF COMMERCE.

UNITED STATES PATENT OFFICE.

*To all persons to whom these presents shall come,
Greeting:*

This is to certify that careful search has been made of the Digest of this Office and no Assignment, Agreement, License, Power of Attorney, or other instrument of writing, or requisition, or order of seizure by the President of the United States or the Alien Property Custodian of the United States, or either of their representatives, is found of record in this Office up to and including July 22, 1926, that may affect Trade-Marks registered by

C. Ingenohl, Antwerp, Belgium, and Manila, Philippine Islands.

Trade-Mark No. 86,533; Registered May 14, 1912.

Trade-Mark No. 86,534; Registered May 14, 1912.

Trade-Mark No. 86,535; Registered May 14, 1912.

In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this fifth day of August, in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the United States of America the one hundred and fifty-first.

(Signed) Wm. A. KINNAN,
(Seal) *Acting Commissioner of Patents.*

UNITED STATES PATENT OFFICE.

C. Ingenohl, of Antwerp, Belgium, and Manila, Philippine Islands.

Trade-Mark for Cigars and Cigarettes.

86,533.

Registered May 14, 1912.

Application filed January 25, 1911. Serial No. 54,090.

STATEMENT.

To all whom it may concern:

Be it known that I, Carl Ingenohl, a subject of the King of Belgium, residing at Antwerp, Belgium, and doing business at No. 40 Rempart Kipdorp Street, Antwerp, Belgium, and also conducting business under the trade-name of El Oriente Fabrica De Tabacos at No. 124 San Pedro Street, Manila, Philippine Islands, have adopted for my use the trade-mark shown in the accompanying drawing.

(CUT OF TRADE-MARK)
El Cometa Del Oriente.

The trade-mark has been continuously used in my business since 1909.

The class of merchandise to which the trade-mark is appropriated is Class No. 17, Tobacco products, and the particular description of goods comprised in said class upon which said trade-mark is used is: cigars and cigarettes.

The trade-mark is usually affixed to the packages and boxes containing the goods by affixing a label thereto having a representation of said trade-mark.

C. INGENOHL.

DECLARATION.

City of Antwerp, Kingdom of Belgium, ss.:

Carl Ingenohl, being duly sworn, deposes and says: that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge, information and belief, has the right to use the said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark has been registered in the Kingdom of Belgium on the 17th day of August, in the year 1900, No. 1214, and that the drawing and description presented truly represent the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

C. INGENOHL.

Subscribed and sworn to before me, this 21 day of November, 1911.

(L. S.)

HENRY W. DIEDERICH,
United States Consul-General.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

UNITED STATES PATENT OFFICE.

C. Ingenohl, of Antwerp, Belgium, and Manila, Philippine Islands.

Trade-Mark for Cigars and Cigarettes.

86,535.

Registered May 14, 1912.

Application filed January 25, 1911. Serial No. 54,093.

STATEMENT.

To all whom it may concern:

Be it known that I, Carl Ingenohl, a subject of the King of Belgium, residing at Antwerp, Belgium, and doing business at No. 40 Rempart Kipdorp Street, Antwerp, Belgium, and also conducting business under the trade-name of El Oriente Fabrica De Tabacos at No. 124 San Pedro Street, Manila, Philippine Islands, have adopted for my use the trade-mark shown in the accompanying drawing.

(CUT OF TRADE-MARK)
(La Perl&Del Oriente)

The trade-mark has been continuously used in my business since 1909.

The class of merchandise to which the trade-mark is appropriated is Class No. 17, Tobacco products, and the particular description of goods comprised in said class upon which said trade-mark is used is: cigars and cigarettes.

The trade-mark is usually affixed to the packages and boxes containing the goods by affixing a label thereto having thereon a representation of said trade-mark.

C. INGENOHL.

DECLARATION.

City of Antwerp, Kingdom of Belgium, ss.:

Carl Ingenohl, being duly sworn, deposes and says: that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge, information and belief, has the right to use the said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark has been registered in the Kingdom of Belgium on the 17th day of August, in the year 1900, No. 1210, and that the drawing and description presented truly represent the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

C. INGENOHL.

Subscribed and sworn to before me, this 21 day of November, 1911.

(L. S.)

HENRY W. DIEDERICH,
United States Consul-General.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

EXHIBIT "B."

DEPARTMENT OF COMMERCE

United States Patent Office

*To all persons to whom these present shall come,
Greeting:*

This is to certify that the annexed is a true copy from the records of this office of the File Wrapper, in the matter of the Abandoned Application for the Registration of a Trade-Mark of Carl Ingenohl, filed January 25, 1911, Serial Number 54,092, for Cigars and Cigarettes, Imperio del Mundo. This application has never been registered.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this ninth day of September, in the year of our Lord, one thousand nine hundred and twenty-six and of the Independence of the United States of America the one hundred and fifty-first.

(Seal)

Attest:

D. E. WILSON,

Chief of Division.

THOMAS E. ROBERTSON,
Commissioner of Patents.

1907

T. M. Serial No. (Series of 1905) 54,092.

Div. —

(Ex'r's Book) 1257.

Trade-Mark No. —

Act of February 20, 1905.

Name, Carl Ingenohl, of Antwerp and Manila, Country Belgium, and Philippine Islands. For Cigars and Cigarettes.

Parts of Application Filed:

Petition, January 25, 1911.
Declaration, January 25, 1911.
Statement, January 25, 1911.
Specimens, January 25, 1911.
Drawing, January 25, 1911.
Fee Cost \$10. January 25, 1911.
Appl. filed complete, Jan. 25, 1911.
Representative, Wise and Lichtenstein, 40 Exchange
Place, New York, N. Y.
Attorney, Wise and Lichtenstein, 40 Exchange
Place, New York City, N. Y.
T. M. Serial No. 54,092.

CLASSIFICATION.

1907

CONTENTS.

Application—papers. O.K.

Cert. Copy.

1. Rej. Mar. 21, 1911.
2. Letter, April 13, 1911.
3. Rej. May 9, 1911.
4. Sub. Dec. Dec. 4, 1911.
5. Rej. Jan. 11, 1912.
6. Letter Feb. 7, 1912.
7. Rej. March 7, 1912.